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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN MANUEL TAMAYO,

Defendant and Appellant.

2d Crim. No. B147843
(Super. Ct. No. CR48374)
(Ventura County)

Juan Manuel Tamayo appeals from a judgment after a jury found him guilty of forcible oral copulation (Pen. Code,¹ § 288a, subd. (c)(2)), sexual battery by restraint (§ 243.4, subd. (a)) and assault with intent to commit felony oral copulation (§ 220). We conclude that statements the victim made to her mother, a police officer, and a sexual assault nurse following a sexual attack were admissible as either fresh complaints or under the spontaneous statement exception to the hearsay rule. There was substantial evidence to support the judgment. We affirm.

¹ All statutory references are to the Penal Code unless otherwise stated.

FACTS

Shortly before noon, Patricia D. heard a knock on her door. She saw Tamayo who was a neighbor and a friend of her mother, Patricia V. She let him in and both started to play video games as they sat on a couch.

Patricia D. testified Tamayo started to kiss her, but she turned away and tried to "push him off." Tamayo then "pinned" her on the couch. He prevented her from moving and pressed her hands against her shoulders. He pulled down her tank top, exposing her breasts. She repeatedly said "no," but he did not stop. He touched and kissed her breast, causing a "hickey." He pulled down her pants and underwear while she resisted. She tried to push him off, but he licked and sucked her vagina. Then he continued to lick her chest. She continued to resist until she freed herself and demanded that he leave. Tamayo eventually left.

Patricia D. paged her mother, Patricia V., with an emergency code around noon time. Patricia V. testified that when she called back, her daughter was crying and said Tamayo "tried to rape her." Patricia V. went directly home and saw her daughter on the couch "curled up in a ball," hysterical, and crying. She testified that her daughter eventually calmed down a little but remained upset throughout the day. Patricia V. did not testify about the details of the attack.

Police officer Alex Arnett testified that at 12:57 p.m. he went to the home and saw Patricia D. "visibly upset, crying [and] shaking." Patricia D. told him Tamayo knocked on the door; she let him in, and they played video games. Tamayo then got on top of her and used his hands and elbows to restrain her hands and arms. He "began to kiss and suck on her breast," pulled her underwear down, and twice licked her vagina. Patricia D. cried during the interview and was shaking when Arnett took her to the police station.

Detective Bruce Reed testified that, at the station, he requested Patricia D. to make a tape recorded "cool call" to Tamayo to obtain evidence on tape. She called him and during the conversation Tamayo said, "It didn't happen, you know[] that[,] but if it did, I'm sorry." Reed described Patricia D.'s demeanor as being "very shaken, upset,

crying at times." After the call, and before the police took her to the hospital, she threw up.

The police took a swab from Patricia D.'s breast which showed the presence of glycogenated nucleated squamous epithelial cells, a substance found in the vagina. The prosecution introduced three photographs which showed a mark on Patricia D.'s left breast.

Jean Matthews, a sexual assault nurse, physically examined and interviewed Patricia D. at the hospital at 4:50 p.m. for over an hour and a half. She testified Patricia D. said Tamayo "orally copulated" her and "sucked on her breast."

Tamayo testified that Patricia D. pulled her blouse down, exposing her breast, and his sexual contact with her was consensual. He denied that his mouth touched her vagina. His lips touched her breast, but he did not lick it, suck it or leave a "hickey." He did not forcibly restrain her.

The court denied Tamayo's objection to the admission of Patricia V.'s testimony and his motion for a new trial.

DISCUSSION

I. Fresh Complaint Rule

Tamayo contends that the trial court erred by admitting Patricia D.'s statements to her mother, Arnett and Matthews under the fresh complaint rule.

Under this rule, a victim's report to others of a sexual attack is admissible evidence. (*People v. Brown* (1994) 8 Cal.4th 746, 763.) The circumstances about how the victim made the report may also be admissible, if relevant. (*Ibid.*) But the details of the report are not admissible. (*Ibid.*)

That Patricia D. reported the incident to these three witnesses is admissible. (*People v. Brown, supra*, 8 Cal.4th at p. 763.) Their testimony about the way she looked when she told them what happened was admissible. (*Ibid.*) Her hysterical demeanor was relevant to rebut Tamayo's claim that the incident was a consensual encounter.

Tamayo contends the testimony of the witnesses about what Patricia D. told them regarding the details of the incident was inadmissible under the fresh complaint

rule. We agree. (*People v. Brown, supra*, 8 Cal.4th at p. 763.) Patricia V. did not testify about the details of the attack. But Arnett and Matthews testified about the details they heard from Patricia D. and that was inadmissible under the fresh complaint rule. (*Ibid.*)

But as the Attorney General correctly notes, Patricia D.'s out-of-court statements were admissible as spontaneous utterances.

II. Spontaneous Statement Exception to Hearsay

Out-of-court-statements are hearsay. But a witness' spontaneous statement made "under the stress of excitement" about an exciting event is admissible as an exception to the hearsay rule. (*People v. Raley* (1992) 2 Cal.4th 870, 892; Evid. Code, § 1240.) "A spontaneous statement is one made without deliberation or reflection. [Citation.]" (*Raley*, at p. 892) We review the trial court's ruling to decide whether it abused its discretion. (*Id.* at p. 894.)

Tamayo contends that substantial time passed before Patricia D. talked to her mother, Arnett, and Matthews. He states she had time to reflect when Arnett and Matthews questioned her. But statements do not necessarily lose their spontaneity if a witness makes them during questioning or even after a lapse of time. (*People v. Raley, supra*, 2 Cal.4th at p. 893.) The critical element is the mental state of the speaker. (*Id.* at p. 892.)

Patricia V. went home as soon as she received her daughter's page. She saw Patricia D. "curled up in a ball" on the couch, hysterical and crying. Arnett testified she was "visibly upset, crying, shaking." Patricia D. made her remarks to her mother shortly after the incident, and Arnett arrived one hour later. The court could reasonably infer that she was still "under the stress of excitement" when she talked with her mother and Arnett. (*People v. Raley, supra*, 2 Cal.4th at pp. 892-893.) The court did not abuse its discretion.

Tamayo contends that because Matthews interviewed her several hours later, Patricia D.'s statements to her were inadmissible. Matthews did not remember Patricia D.'s demeanor. She testified her notes reflected she was cooperative and calm. But Patricia D. testified that she threw up before going to the hospital. Patricia V.

testified that her daughter calmed down a little, but remained upset throughout the day. Arnett and Reed testified that hours after the attack, Patricia D. was still shaking and upset. Tamayo has not shown why the court could not reasonably infer from the testimony of Patricia D., her mother, Arnett and Reed that she was still "under the stress of excitement" when Matthews interviewed her. (*People v. Raley, supra*, 2 Cal.4th at pp. 892-893.)

But even if the court erred, it was not reasonably probable that the result would have been different without Matthews' testimony. What Patricia D. told her was consistent with Patricia D.'s trial testimony. It was also consistent with what Patricia D. told her mother and Arnett. The observations of Patricia V., Arnett and Reed supported Patricia D.'s claim that she was a victim of a sexual attack. She was curled up in a ball, hysterical and crying. The swab from Patricia D.'s breast showed traces of a substance found in the vagina. The jury could reasonably infer this supported Patricia D.'s claim that Tamayo licked her vagina and her breast. Patricia D.'s testimony that Tamayo left a "hickey" on her breast is supported by three photographs which show a mark in that area.

Tamayo claims he denied doing anything wrong in the telephone call. But he also testified he told Patricia D., "It didn't happen, you know[] that[,] but if it did, I'm sorry." The jury could reasonably infer that this was incriminating. Tamayo has not shown prejudicial error.

III. Substantial Evidence

Tamayo contends that the evidence was insufficient to convict him of forced oral copulation, sexual battery and assault to commit oral copulation. We disagree.

In deciding the sufficiency of the evidence, we ask whether "' . . . after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citation.]" (*People v. Hatch* (2000) 22 Cal.4th 260, 272.)

To prove sexual battery, the prosecution must establish that Tamayo touched an intimate part of Patricia D., against her will, while restraining her for sexual

gratification, arousal or abuse. (§ 243.4, subd. (a).) "Oral copulation is the act of copulating the mouth of one person with the sexual organ or anus of another person." (§ 288a, subd. (a).) Even slight contact between the mouth and the sexual organ is oral copulation. (*People v. Grim* (1992) 9 Cal.App.4th 1240, 1243.) Forced oral copulation involves performing that act against the victim's will "by means of force, violence, duress, menace, or fear" (§ 288a, subd. (c)(2).) A defendant who commits an act likely to result in physical force against another with the intent of committing oral copulation is guilty of assault. (§§ 220, 240; CALJIC Nos. 9 & 9.09.)

The evidence unquestionably established that Tamayo committed sexual battery, assault and forced oral copulation. Patricia D. testified Tamayo "pinned" her on the couch. He prevented her from moving and pressed her hands against her shoulders. Tamayo pulled down Patricia D.'s tank top, exposing her breasts. She repeatedly said "no," but he did not stop. He touched and kissed her breast, causing a "hickey." Tamayo pulled down her pants and underwear while she resisted. She tried to push him off, but he licked and sucked her vagina. Then he continued to lick her chest.

Tamayo contends his testimony shows he acted with Patricia D.'s consent and she was not credible. But we resolve neither credibility issues nor evidentiary conflicts. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) The jury believed Patricia D. Her testimony was supported by photographic and scientific evidence, and the observations of witnesses who saw her emotional reactions after the attack. Tamayo has not shown a lack of substantial evidence.

The judgment is affirmed.

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GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Allan L. Steele, Judge

Superior Court County of Ventura

Meghan B. Clark, under appointment by the Court of Appeal, for
Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant
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